No. 6644

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM L. HUGHSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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THE FACTS.

This action was instituted by the United States of America to recover a money judgment from appellant Hughson as surety, and defendant Hader as principal, upon four certain bonds, executed by them in connection with the attempted staying of the collection of certain deficiency taxes assessed against the defendant Hader for the years 1920, 1921, 1922 and 1923. This is not an action for the collection of income taxes, but is an ordinary action upon contract. The action went to trial as against only one defendant, namely, William L. Hughson, the appellant herein. The other party defendant, Hader, was not before the Court.

There are four causes of action stated in the complaint on file herein, each being upon a separate bond.

In May, 1925, as is alleged in Paragraph V of each of the four causes of action in said complaint, the Commissioner of Internal Revenue assessed deficiency taxes and penalties against Hader for each of the four years above referred to. Hader, in attempting to take and perfect an appeal from each of said four determinations of the Commissioner, filed a purported appeal with the United States Board of Tax Appeals.

It is alleged in the complaint, that on May 15th, 1925, the Collector demanded of Hader payment of the deficiency taxes, and that on May 18th, 1925, the Deputy Commissioner, in writing, notified Hader of the assessment thereof.

It is then alleged that on June 8th, 1925, Hader filed four claims in abatement, seeking abatement of the deficiency tax for each of the four years mentioned.

On November 17th, 1925 (3 B. T. A. 1367), the purported, or attempted appeal so filed by Hader was dismissed by the Board of Tax Appeals upon the ground that it had been prematurely taken.

On December 9th, 1927, as alleged in Paragraph VIII of the first, second and fourth causes of action, and in Paragraph VII of the third cause of action in said complaint, the Commissioner of Internal Revenue rejected each of said claims in abatement.

Thereafter, and on the 7th day of January, 1931, this action was commenced.

WILLIAM L. HUGHSON'S DEFENSE.

Appellant Hughson, in his answer (Transcript pp. 37-48), to plaintiff's complaint herein, sets up the following defenses to each of the four causes of action appearing in the complaint on file herein,

1st. Denial of his liability upon each of the four bonds above referred to, because of lack of consideration.

2nd. Each of said causes of action was barred under the provision of Section 791, Title 28, United States Code.

3rd. Said bonds were not filed within the time required by law, and were never accepted or approved by the Collector of Internal Revenue, as required by law.

4th. The claims in abatement were not filed within the time required by law.

5th. Appellant Hughson, on January 15th, 1930, made to the Commissioner of Internal Revenue, an offer of compromise, of his alleged liability upon the four bonds involved herein, and the Commissioner of Internal Revenue, upon the 7th day of February, 1930, accepted $100.00 from said Hughson in full payment of all claims against said Hughson upon said four bonds.

THE JUDGMENT.

On August 19th, 1931, after the submission of said cause for decision, the United States District Court gave and made its judgment in favor of the United

States, and against William L. Hughson, upon each of the four causes of action, set forth in said complaint, and directed (Transcript pp. 55-56) that the United States recover from said Hughson:

a. On the first cause of action, the sum of $1,-814.03 with interest at 6% from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum.

b. On the second cause of action, the sum of $1,-323.11, with interest at 6% from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum.

c. On the third cause of action, the sum of $947.41, with interest at 6% from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum.

d. On the fourth cause of action, the sum of $670.80, with interest at 6% from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum, together with costs of suit.

APPELLANT'S POINTS.

Appellant Hughson, in taking an appeal to this Honorable Court, respectfully requests that the judgment given and made by said trial Court in favor of the United States of America, and against this appellant, be reversed, and a judgment be entered in favor of appellant Hughson, for costs upon the following grounds:

1. *There was no consideration for the bonds.*

2. *Statute of Limitations bars this action.*

3. *Bonds were never accepted and approved.*

4. *Bonds and abatement claims filed too late.*

5. *There was an accord and satisfaction which released Hughson.*

6. *No allegation or finding that Hader perfected appeal.*

7. *Interest at 12% per annum is improper.*

8. *Evidence* (Transcript p. 58) *in Assignment of Errors XIII* (Transcript p. 103) *improperly admitted.*

9. *Evidence* (Transcript p. 60) *referred to in Assignment of Errors XIV* (Transcript p. 104) *improperly admitted.*

10. *Evidence* (Transcript p. 61) *referred to in Assignment of Errors XV* (Transcript p. 104) *improperly admitted.*

11. *Plaintiff's Exhibit No. 1* (Transcript pp. 67-70) referred to in Assignment of Errors XVI (Transcript p. 104) *improperly admitted.*

12. *Plaintiff's Exhibit No. 2* (Transcript pp. 71-76) referred to in assignment of Errors XVII (Transcript p. 104) *improperly admitted.*

ARGUMENT.

1. NO CONSIDERATION FOR BONDS.

To save the time of this Court in reading through the entire bond, we take the liberty of quoting that certain portion thereof, which we claim, in the light of the admitted and proven facts, established beyond a doubt, that there was no consideration for the execution of these four bonds, to-wit:

> "Whereas, the principal herein has perfected an appeal from the determination of the Commissioner assessing the deficiency tax for the year....., and desires that the payment of the deficiency tax be extended until the determination of said appeal, as a matter of fairness and justice." (Transcript pp. 24-25.)

There was no consideration for the execution by Hughson of either of the four bonds in suit, as they were executed under the erroneous assumption that appeals had been taken and perfected, which assumption was not a fact. (Assignment of Errors II, III, and IV, Transcript pp. 100-101.)

These four bonds were executed by appellant Hughson, as surety, for the express purpose, therein stated, of staying the collection of the taxes assessed against Hader, until the disposal of the appeals, which, it was assumed as recited in the bonds, had been perfected by Hader.

That notice of appeal to the Board of Tax Appeals was filed by Hader, is admitted. On November 17th, 1925, this purported appeal was dismissed by the Board of Tax Appeals (3 B. T. A. 1367), on the ground that the appeal had been prematurely taken,

in that it was not based upon a final determination by the Commissioner.

In re Jackson K. Dering, 3 B. T. A. 1312;
In re Clois L. Greene, 2 B. T. A. 148.

The effect of this order, so made by the Board of Tax Appeals, was a finding that at the time Hader sought to take this appeal, there was in existence no order or determination from which he had a right to take an appeal, and the appeal so attempted to be taken by him was abortive. In other words, so far as the record was concerned, Hader had taken no appeal. This being so, the recital in the bonds, that Hader had perfected an appeal, is and was untrue, and as that was the express condition upon which the execution of the bonds was predicated, it resulted in destroying the entire consideration for the execution of these four bonds.

In support of the foregoing contention, we respectfully direct the Court's attention to the case of *Clarke v. Mohr,* 125 Cal. 540.

In this case, certain undertakings or bonds on appeal, were signed and executed by the parties and sureties on October 9th, 1898. Each of these bonds recited the rendition of a judgment, the dissatisfaction of appellant therewith, a denial of a motion for new trial, and the desire of the parties to appeal therefrom; and that in consideration of the premises the sureties undertook and promised, etc. In truth, the motion for new trial was not denied until December 2nd, 1898, indicating that motion for new trial had not been passed upon at the time the bonds were signed. The Supreme Court dismissed the appeals

from the order denying the motion for new trial, with the following comment:

> "At the time the instruments were signed the motion for a new trial had not been presented to the Court for its consideration, and the order denying it, was not made until December 2, 1898. There was therefore, no right to appeal therefrom on behalf of either of the appellants at the time they were signed and verified, and consequently no consideration for the execution of an undertaking upon such appeal." (p. 542.)

In further support of our contention, and in approval of the case of *Clarke v. Mohr,* supra, we cite the following cases:

Stackpole v. Hermann, 126 Cal. 465, 466;
Jarman v. Rea, 129 Cal. 157, 159.

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2. STATUTE OF LIMITATIONS BARS THIS ACTION.

The bonds in suit were executed and filed August 25th, 1925. (Transcript p. 60.) The complaint in this cause was filed January 7th, 1931. (Transcript p. 36.) More than five years elapsed between the time of the signing of the bonds and the commencement of this action.

Section 791, Article 28, of the United States Code provides that

> "no suit or prosecution for any penalty or forfeiture, pecuniary, or otherwise, accruing under the law of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced

within five years from the time when the penalty of forfeiture accrued."

Conceding, for the sake of argument only, that the bonds in suit were valid, and were properly accepted and approved as required by law, and that the obligations thereof became binding upon the surety, we insist that the obligations of the surety accrued and became binding, if at all, on November 17th, 1925, on which date the Board of Tax Appeals dismissed Hader's premature appeal. The bonds were executed upon the 25th day of August, 1925, and recited that they were executed for the express purpose of staying collection of taxes pending the appeal. Therefore, cause of action on these bonds accrued November 17th, 1925.

We honestly believe, that, inasmuch as no appeal was ever perfected by Hader, the bond, if considered binding at all, became effective on the 25th day of August, 1925. We are admitting however, for the sake of argument under this point alone, that they became effective as a liability against Hughson on the 17th of November, 1925. This action was commenced January 7th, 1931, as appears by the date of the filing of plaintiff's complaint herein.

It is quite true that the defense of the Statute of Limitations cannot be raised against the United States in an action in which the Government is a party, providing that in such action, the Government is setting up and claiming sovereign rights. This however, is not an action against Hughson based upon any of the sovereign rights of the Government against

Hughson, but is an ordinary action at law based upon four separate distinct written contracts, to which the same statutes are applicable, as would apply in an action between individual citizens of the Government, or between the Government and a citizen.

Under such circumstances, the appellant herein insists that he is absolutely justified in setting up the defense of the Statute of Limitations, against the United States, the appellee in this cause.

U. S. v. Nashville, et al., 118 U. S. 120, 125;
U. S. v. Seaboard Air Line, 22 Fed. 2nd 113.

In support of our contention that the four causes of action set forth in plaintiff's complaint herein, are barred by Title 27, Section 791 of the United States Code, because plaintiff and appellee herein is seeking the recovery of a penalty, we direct the Court's attention to the case of

Farni v. Tesson, 66 U. S. 309, 17 L. ed. U. S. 67.

In the case last cited, the United States Supreme Court said, in so many words, that "an action of debt on a bond is a demand for a penalty."

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3. **BONDS WERE NOT ACCEPTED OR APPROVED.**

The four bonds in suit never became binding obligations upon appellant Hughson, because they were never accepted or approved by the Collector of Internal Revenue, as required by the law and the regulations.

The regulations (Reg. 65, Art. 1281), required that the bonds must be approved by the Collector. There

is no endorsement on either of the four bonds in suit, showing that they were ever approved, nor was any evidence offered upon the trial of this case indicating the approval of these bonds by the Collector, nor was there any evidence that notice of the approval of said bonds was ever given by the Collector to any person, nor was there any evidence that any extension of time for the payment of the Hader taxes, was ever granted for any specific definite time, because of the filing of these four bonds.

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4. BONDS AND ABATEMENT CLAIMS FILED TOO LATE.

Neither the claims in abatement, nor the bonds in suit were filed within the proper time, under the Revenue Act of 1924, which was the Revenue Act in force at the time of the filing of the abatement claims and the bonds which are the subject of controversy in this proceeding.

The Revenue Act of 1924, Sec. 274, Sub. "d," provides for the assessment, levy and collection of jeopardy assessments. The last portion of said Subdivision "d" of said section, reads as follows:

> "If the taxpayer does not file a claim in abatement as provided in Section 279, the deficiency so assessed (* * *) shall be paid upon notice and demand from the Collector."

Sec. 279, Sub. "a" of said Revenue Act of 1924, provides that

> "If a deficiency has been assessed under Subdivision (d) of Section 274, the taxpayer, within 10 days after notice and demand from the Collector,"

may file a claim in abatement, accompanied by a bond. Art. 1281 of Reg. 65 of the Treasury Department, which were the regulations in force at the time these claims in abatement and bonds were filed, provides,

> "The bond shall be executed by a surety company holding a certificate of authority from the Secretary of the Treasury as an acceptable surety on Federal bonds, and shall be subject to the approval of the Collector."

Art. 1281, Reg. 65, also provides,

> "The claim and bond must be filed with the Collector within 10 days after notice and demand from the Collector for payment of the deficiency."

There was no evidence introduced at the trial of this action showing positively and definitely, upon what dates the Collector made a demand upon Hader for the payment of these deficiency taxes, or when the Commissioner notified Hader thereof; but Paragraph V of each of the causes of action in plaintiff's complaint (Transcript p. 4) alleges that the Collector made such demand for payment upon Hader on May 15th, 1925, and that on May 18th, 1925, the Deputy Commissioner of Internal Revenue notified Hader, in writing, that an "assessment had been made in accordance with the provisions of Section 279 (d) of the Revenue Act of 1924."

The claims in abatement were filed by Hader on June 8th, 1925 (Transcript p. 59), and the four bonds, which William L. Hughson signed as a surety, did not accompany the claims in abatement, but said

bonds were filed with the Collector on the 25th day of August, 1925. (Transcript p. 60.)

We respectfully insist that the Collector of Internal Revenue had authority, under the law and the Treasury Department regulations, only to receive these claims in abatement from Hader, within the 10 days after a demand for the payment of the tax had been made upon said Hader, and only on condition that accompanying said claims in abatement, were the bonds referred to in said Section 279 of the Revenue Act of 1924. Upon the expiration of said 10 day period, said Collector was without any authority to stay the collection of taxes assessed under the jeopardy assessment; and the filing, by Hader, of claims in abatement on June 8th, 1925, more than 10 days after demand for payment of tax, and the signing and filing of the bonds in suit, on the 25th day of August, 1925, were mere idle acts, and could not, and did not, operate to stay the collection of these deficiency taxes, inasmuch as these deficiency taxes became due and payable immediately on demand under Sec. 274, Sub. "d" of the 1924 Revenue Act, unless within the period of 10 days following the demand for payment, a claim in abatement and bond were filed in accordance with the provisions in Section 279a of said 1924 Revenue Act.

As neither the claims in abatement, nor the bonds filed by Hader, were on file within the 10 day period, the Collector had no authority, under the law, to accept either the claims in abatement, or the bonds; nor did he have any authority to stay the collection of these deficiency taxes.

In this connection, we desire to particularly direct the Court's attention to the first paragraph of the opinion of the Board of Tax Appeals in the case of

White Oak Gasoline Co. v. Commissioner, 6 B. T. A. 941, 942,

from which we quote the following:

> "The Commissioner contends that the filing of a bond with a claim in abatement is a *sine qua non* to jurisdiction in this Board on appeal from the Commissioner's action on such claim. It is his contention that a claim so filed is erroneously filed and in fact never properly or legally filed at all; and that if the Commissioner accepts a claim under such conditions and thereafter passes upon it and makes a determination thereon, his action is void and his determination is of no effect because there is no claim before him as a predicate for any action."

The foregoing language quoted from the said opinion, is the exact position which is taken by us in this case.

We have contended, and still contend that the Collector of Internal Revenue, and even the Commissioner, is without authority to give any consideration to a claim in abatement unless the claim be filed within 10 days after demand for the payment of a jeopardy assessment, and unless, furthermore, a proper bond accompanies the claim in abatement.

This contention of ours besides being sustained by the contention of the Commissioner in the *White Oak Gasoline* case (supra), is also sustained by the Board of Tax Appeals in

Caribou Oil M. Co. v. Commissioner, 6 B. T. A. 511, 515;
Alabama Hardware Co. v. Commissioner, 7 B. T. A. 1178, 1182.

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5. ACCORD AND SATISFACTION.

On January 15th, 1930, almost a year prior to the commencement of this action, appellant Hughson, through his attorney, sent to the Commissioner of Internal Revenue at Washington, D. C., a written offer, Defendant's Exhibit No. 3, wherein he offered to pay, and enclosed a check for, the sum of $100.00 in full settlement of any and all claims which the Commissioner or Government held against him by reason of the execution by him, as surety, of the four bonds in suit. This check (Defendant's Exhibit No. 2, Transcript pp. 62, 63), was received by the Commissioner of Internal Revenue, was endorsed by him, and was evidently forwarded by him to the Collector of Internal Revenue at San Francisco, and collected through the San Francisco Federal Reserve Bank on February 7th, 1930. In receiving and endorsing said check, without any qualification or limitation, that act of endorsement, by the Commissioner, and the cashing of that check, operated as an unqualified acceptance of the offer of compromise so made by Hughson, and Hughson was thereupon immediately released from all liability under the four bonds in suit.

Upon the trial, and after this offer of compromise, Defendant's Exhibit No. 3, was admitted in evidence

without objection, plaintiff offered, and there was admitted in evidence, over the objection of said Hughson, another purported offer in compromise, which, it is claimed by the plaintiff and respondent, was the real offer of compromise submitted by said Hughson.

At a subsequent point in this brief (Point 12) we will discuss the structure and effect of Plaintiff's Exhibit No. 2, which is the other offer in compromise just referred to.

At the time Hughson submitted this offer of compromise, Defendant's Exhibit No. 3 (Transcript pp. 92, 95), to-wit, January 15th, 1930, the United States, and the Commissioner of Internal Revenue, or the Collector of Internal Revenue still had the right, and the time, to take such proceedings as might be appropriate, seeking to collect the taxes due from Hader. The Statute of Limitations had not yet commenced to run against the prosecuting of such a proceeding, nor had the warrants of distraint ever been withdrawn or vacated.

This offer made by Hughson was made in response to a letter to Harry F. Sullivan, from the General Counsel, Bureau of Internal Revenue, dated January 8th, 1930, being a portion of Defendant's Exhibit No. 4 herein. (Transcript pp. 95, 96.) In response to that letter Mr. Sullivan forwarded the written offer of compromise, Defendant's Exhibit No. 3, together with Hughson's check for $100.00, payable to the Commissioner of Internal Revenue. There is no evidence in the record in this case—because none exists—indicating that Mr. Sullivan, who forwarded this offer to the General Counsel, Bureau of Internal

Revenue, was ever advised by any person of the receipt or rejection of that offer of compromise.

After that check was endorsed, at Washington, by the Commissioner, it was evidently sent to the Collector of Internal Revenue at San Francisco, California, being received by him on or prior to February 6th, 1930, and it appears to have been certified on February 6th, 1930. There is no writing or mark on that check indicating that it was endorsed or accepted by the Commissioner with any limitation or qualification.

Hughson's check for $100.00 was cashed, and the money actually received and accepted by both the Commissioner and the Collector of Internal Revenue, without qualification or limitation, and long before Hughson's offer of compromise was ever rejected, if it was rejected.

In support of our claim that there was a completely executed accord and satisfaction of the claim against Hughson on these four bonds, we desire to call the Court's attention to the following language, which we quote from

1 *R. C. L.,* 196 and 197.

> "and when a check is sent upon the condition that it be accepted in full payment of a disputed claim, there is, as a general rule but one of two courses opened to the creditor, either to decline the offer and return the check, or to accept it with the condition attached. *The moment the creditor endorses and collects the check, knowing it was offered only upon condition, he thereby agrees to the condition, and is estopped from denying such agreement.*"

In the case of

Road Improvement District v. Wilkerson, 5 Fed. 2nd, 416, 418.

"It is a general principle of law, that, where there is a dispute concerning a claim, and a check is given, or other remittance to the creditor, which recites that it is in full payment of the claim, and the same is accepted by the creditor, *or the creditor collects the check without objection,* the transaction constitutes an accord and satisfaction."

We also respectfully call the Court's attention to the language of the Supreme Court of the State of California in a very well considered opinion, in the case of

Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 27.

"The great weight of authority in American Courts undoubtedly supports the rule that where the amount due is in dispute, and a check for an amount less than that claimed is sent to the creditor with a statement that it is sent in full satisfaction of the claim, and the tender is accompanied by such acts or declarations as amount to a condition that if the check is accepted at all, it is accepted in full satisfaction of the disputed claim, and the creditor so understands, its acceptance by the creditor constitutes an accord and satisfaction, even though the creditor states at the time that the amount tendered is not accepted in full satisfaction. * * *

"It may be accepted as settled law that where a claim is in dispute and the debtor sends or gives the creditor a check for a less sum, which

> he declares to be in full payment of all demands the recognition thereof by the creditor constitutes an accord and satisfaction."

In further support of the theory announced in the above citations, we direct the Court's attention to the following cases:

U. S. B. & S. Co. v. Thissell, 199 U. S. 608, 50 L. ed. U. S. 331;

C. M. & St. P. R. R. v. Clark, 178 U. S. 353, 44 L. ed. U. S. 1099;

Garfield, etc. v. Zendel, 43 Fed. 2d. 537;

Schwartzenberg v. Mayerson, 2 Fed. 2d. 327.

There is no positive direct evidence in the record indicating that either Mr. Hughson's offer of compromise, Defendant's Exhibit No. 3, or the other offer in compromise, Plaintiff's Exhibit No. 2, was ever rejected by the Commissioner of Internal Revenue, or that Mr. Hughson, or his attorney, Mr. Sullivan, was ever advised of the rejection of the compromise offer. The only hint that any offer was rejected, is contained in the testimony of Mr. John P. McLaughlin, in which he says "when the offer was rejected I tendered by telephone the check to Mr. Hughson." (Transcript p. 65.)

The above quoted testimony given by the witness McLaughlin calls up another question, namely, was there ever a real tender of the sum of $100.00 to Hughson, after his compromise was rejected, if it ever was rejected. The only testimony upon this point was given by the witness McLaughlin in that portion thereof above quoted.

We respectfully insist that a telephonic offer to deliver a check for $100.00 is not a good and valid tender. It is not a tender upon which anything will be predicated by the law. The only legal tender we know of, is the present personal offering in gold coin or currency, the same being at the time, in the possession of the party making the tender. This principle is so well known and so well understood, that we almost hesitated to mention it, and will certainly not be so indiscreet as to cite any authorities.

Let us refer back for a moment to the testimony of Mr. McLaughlin referred to a few lines above, when we quoted him as saying "when the offer was rejected I tendered by telephone the check to Mr. Hughson." (Transcript p. 65.)

To which offer did the witness McLaughlin refer in that statement? Did he intend us to conclude from that statement that the offer of January 15th, 1930, Defendant's Exhibit No. 3, was rejected? Quite apparently not, because Mr. McLaughlin was banking everything upon the other offer, Plaintiff's Exhibit No. 2. If then Plaintiff's Exhibit No. 2 was the offer which Mr. McLaughlin referred to as having been rejected, there is no alternative but for us to conclude that this other offer of January 15th, 1930, Defendant's Exhibit No. 3, was not rejected.

There is no indication or mark of any kind on Plaintiff's Exhibit No. 2, from which anyone could draw the deduction that it was intended as a modification of Hughson's offer of January 15th, 1930 (Defendant's Exhibit No. 3), or that it was intended as a substitute for this latter offer.

These two offers are separate and distinct, neither one referring to the other, and each seeks apparently, to compromise a liability separate and distinct from the liability referred to in the other. Defendant's Exhibit No. 3 is an offer by Hughson to compromise his alleged and disputed liability under four certain bonds, while Plaintiff's Exhibit No. 2, to which Hughson's name is improperly signed, is apparently an offer to compromise a liability not against Hughson, but a tax liability against Hader for deficiency taxes.

Furthermore, regardless of which offer, it may have been, that Mr. McLaughlin believed was rejected, there is certainly no testimony in the record in this case showing that two offers were rejected, even if we concede for the sake of the argument, that there is any evidence in this record showing that any offer was rejected. It necessarily follows therefore, that if two offers were presented, and only one was rejected, then by process of elimination, the other was not rejected; and, inasmuch as Hughson sent $100.00 to the Commissioner with his offer of January 15th, 1930, Defendant's Exhibit No. 3, then we are forced to conclude that this $100.00 was received and accepted by the Commissioner under the offer with which it was sent to him, and which was never rejected.

6. NO ALLEGATION OR FINDING THAT HADER PERFECTED APPEAL.

In Paragraph VI of the first, second, and fourth causes of action (Transcript p. 4), and in Paragraph V of the third cause of action, set forth in plaintiff's complaint, there is an allegation that Hader filed an appeal with the Board of Tax Appeals, but there is not, in said complaint, any allegation that this appeal was perfected.

Nor is there any finding made by the trial Court, to the effect, that Hader had perfected an appeal.

For the purpose of enforcing liability against Hughson, the surety upon these four bonds, it was absolutely essential that it be alleged in the pleadings, and that the Court make a finding, if such were the fact, that Hader had perfected an appeal. This was the primary and all-important condition upon which the execution of these bonds by Hughson, was predicated. Without such a finding we respectfully, but earnestly, insist that the judgment rendered herein, in favor of the United States, cannot be supported.

Hughson's intent, in signing these bonds, was to permit Hader to defer the payment of taxes due from Hader until an appeal, already perfected, had been heard and passed on by the Board of Tax Appeals. If the appeal were not perfected before these bonds were signed, then the bonds never became operative.

Both the Commissioner of Internal Revenue, and the Collector of Internal Revenue, from experience, and by reason of the nature of their duties, knew this, and also knew that they were immediately entitled to proceed against Hader to collect his taxes,

by warrant of distraint, or otherwise. The fact that they failed to act did not, and could not, have the effect of vitalizing these four bonds, the obligations of which were never given birth.

White Oak Gasoline Co. v. Commissioner, 6 B. T. A. 941, 942;

Caribou Oil M. Co. v. Commissioner, 6 B. T. A. 511, 515;

Alabama Hardware Co. v. Commissioner, 7 B. T. A. 1178, 1182.

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7. INTEREST AT 12% PER ANNUM IS IMPROPER.

This is not an action against Hughson as a taxpayer, but it is one seeking to enforce his alleged liability as a surety on the four bonds in suit. The limits of Hughson's liability, if any, are embraced solely and strictly, within the language and terms of these four bonds.

The judgment in this case directed that the plaintiff, appellee herein, recover judgment against the defendant Hughson, appellant herein, for four certain amounts for each of the four years respectively, for which deficiency taxes were assessed against Hader, with interest at 6 % from May 15th, 1925, to July 15th, 1928, and thereafter at the rate of 12% per annum. (Transcript p. 56.)

There is no allegation in plaintiff's complaint setting up any fact or reason for the raising of the interest from 6% to 12% subsequent to July 15th, 1928; nor is there any statement in the bonds in suit showing any right to, or reason for, raising the interest after July 15th, 1928, from 6% to 12%.

8. ERROR IN ADMISSION OF TESTIMONY.

Appellant has assigned (Assignment XIII) (Transcript p. 103) as error, the action of the trial Court in overruling the objection to the following question:

> "Q. Mr. McLaughlin, I now show you a certified copy of an assessment certificate against Mr. Carl O. Hader, for various amounts covering several years. I would like to have you look at that and tell me when that assessment certificate came to your office, if you know. You can refresh your recollection with it." (Transcript p. 58.)

Defendant Hughson objected to this question on the ground that it was irrelevant, immaterial and incompetent, so far as defendant Hughson was concerned, in that Hughson was not a party to any proceeding concerning which that certified copy was filed with the Collector of Internal Revenue at San Francisco. This is an action upon certain bonds. (Transcript pp. 58-59.)

We respectfully insist that the action of the Court, in overruling the objection to the question above set forth, was erroneous in this; Hughson did not figure at all in this matter, until the bonds were signed by him on the 25th day of August, 1925. Hader, the taxpayer, against whom the assessment was made, was not before the Court upon the trial of this action, as he was never served with a copy of the summons and complaint. We fail to see how any action taken by the Department prior to August 25th, 1925, could, in any way, affect the defendant and appellant William L. Hughson, or his liability on these bonds.

9. ERROR IN ADMISSION OF EVIDENCE.

In assignment of Errors XIV (Transcript p. 104), defendant and appellant William L. Hughson respectfully insists that the trial Court erred in overruling his objection to the question "Why not?" (Transcript p. 60), after the witness John P. McLaughlin, had testified, that between August, 1925, and March, 1928, he took no steps to collect these taxes from Hader.

Defendant Hughson objected to that question upon the ground that it called for the conclusion of the witness, and we fail to appreciate what influenced the mind of the Court to overrule the objection on the ground stated. In our humble judgment, use of the word "Why" necessarily calls for a conclusion.

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10. EVIDENCE IMPROPERLY ADMITTED.

In assignment of errors No. XV (Transcript p. 104), defendant and appellant Hughson assigns as error, the failure of the Court to strike out the words "which covered the claims" as they appear in witness McLaughlin's answer to the following question:

> "Q. Did you have any reason for not attempting to make collection upon this assessment?
>
> A. The fact that I had bonds which covered the claims, and that the claims were pending, and until the claims were rejected there should be no action. After that we could proceed at any time. We had to." (Transcript p. 60.)

Mr. McLaughlin did not qualify as an expert on legal questions and, as a matter of fact, whether or

not the bonds covered the claims, was one of the matters which was before the Court for consideration, and it was the Court's duty, and not Mr. McLaughlin's, to arrive at a conclusion as to whether or not the bonds covered the claims.

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11. PLAINTIFF'S EXHIBIT NO. 1, ASSESSMENT CERTIFICATE, IMPROPERLY ADMITTED IN EVIDENCE.

As set forth in assignment of errors XVI (Transcript p. 104), defendant and appellant Hughson objected to the ruling of the trial Court in admitting in evidence Plaintiff's Exhibit No. 1. (Transcript p. 62.)

The admission of this exhibit in evidence was objected to upon the ground that it was absolutely irrelevant, immaterial and incompetent so far as defendant Hughson is concerned, in that Hughson was not a party to any proceedings concerning which that certified copy was filed with the Collector of Internal Revenue, at San Francisco, California, and that the Government was limited in proving its cause of action in this case, to the introduction (Transcript pp. 62 and 58-59) of these bonds, the execution of which was admitted.

We respectfully insist that the introduction of this document in evidence, referring as it evidently does, to the assessment of taxes against Hader at a date prior to the 25th of August, 1925, cannot, in any way, affect any of the obligations of Mr. Hughson under these bonds executed subsequently thereto.

12. PLAINTIFF'S EXHIBIT NO. 2, "OFFER IN COMPROMISE" IMPROPERLY ADMITTED IN EVIDENCE.

We respectfully insist (Assignment of Errors XVII, Transcript p. 104) that the trial Court erred in admitting in evidence Plaintiff's Exhibit No. 2, for the reason that it was immaterial, incompetent, and irrelevant, so far as appellant Hughson was concerned, was not part of his original offer of January 15th, 1930, and could not, and did not, modify or vary said original offer of January 15th, 1930.

At the top of this "Offer in Compromise" (Transcript p. 71), over the printed words "Name of Taxpayer" appears in typewriting, "William L. Hughson," and two lines below the word "Sir," we read "Charges of violation of Law, or failure to meet an internal revenue obligation have been made against the taxpayer named above as follows: in settlement of Income Tax liability of Carl O. Hader for the years 1920 to 1924 inclusive.", and below this appears the following, "Date and place of alleged violation Jan. 25, 1930, San Francisco, Calif." (Transcript p. 71.)

In the first place, William L. Hughson is not involved in this matter as a taxpayer. There is not, and never was, any tax liability against him, by reason of any deficiency tax assessed against Hader. Hughson's liability, if any then existed, was solely contractual.

Secondly, this instrument, Plaintiff's Exhibit No. 2, is not an offer to compromise Hughson's liability as a surety upon these bonds, and this alone was the primary obligation incurred by Hughson, on which he would be liable, if any liability existed at all.

Thirdly, the alleged violation of law, sought to be compromised as appears in this offer, Plaintiff's Exhibit No. 2, is set forth as having occurred on January 25th, 1930. This is absolutely incorrect, immaterial, irrelevant and incompetent, and in conflict with extant facts, as that date is subsequent to the date of Hughson's check and subsequent to the date of the offer of compromise, Defendant's Exhibit No. 3, which Hughson's attorney, Mr. Harry F. Sullivan, sent to Washington. If any liability accrued at all against Hughson, it was certainly not a tax liability, and it accrued, if at all, as surety on these four bonds, on November 17th, 1925, upon the entry, by the Board of Tax Appeals, of its order dismissing Hader's appeal.

Fourthly, in Plaintiff's Exhibit No. 2, which is dated February 4th, 1930, is a statement that the sum of $100.00 is tendered as a compromise offer. As a matter of fact, there is no testimony that $100.00 was delivered by Mr. Hughson to the Collector of Internal Revenue, or to any person for him on February 4th, 1930, when this offer is claimed to have been made.

This "Offer in Compromise," Plaintiff's Exhibit No. 2, does not, in any way, refer to his obligation as a surety, which Hughson offered to compromise in the written offer, Defendant's Exhibit No. 3, forwarded by Mr. Sullivan for Hughson to the General Counsel of the Bureau of Internal Revenue at Washington, on January 15th, 1930. Furthermore, Hughson's check for $100.00 was made payable to the Commissioner of Internal Revenue, and was already endorsed and accepted by him, prior to the time that

Plaintiff's Exhibit No. 2 was signed. Hughson was not primarily interested, or concerned in settling Hader's tax liability to the Federal Government. Hughson was concerned however, in securing from the United States, and the Commissioner of Internal Revenue, a release from his liability as surety on these bonds.

At the time when Mr. McLaughlin, the Collecter of Internal Revenue, obtained Mr. Hughson's signature on this offer in compromise—Plaintiff's Exhibit No. 2—and for some time thereafter—in fact right down to the time the complaint was filed in this action, and even for sometime thereafter, Hader's obligation to pay the deficiency taxes assessed against him was still a valid, live, extant, binding, and enforcible obligation. The Commissioner of Internal Revenue and the Collector of Internal Revenue had not lost or waived any right to take appropriate proceedings against Hader at the time this action was initiated. Neither had the presentation or filing of these bonds, or the signing thereof by Hughson deceived or misled the Commissioner or the Collector of Internal Revenue, or directly or indirectly caused them to lose any existing right to proceed against Hader, upon Hader's primary liability.

Even after the Commissioner of Internal Revenue had accepted Hughson's check for $100.00, his act in so doing could not, and did not, operate to release Hader of his tax liability. Therefore, even after the acceptance of this sum of $100.00 from Hughson, the Commissioner and the Collector of Internal Revenue still had the right, and the time was still open, to take

appropriate proceedings against Hader to enforce his tax liability.

The liability of Hughson upon these four bonds was separate and distinct from the liability of Hader to pay the deficiency taxes assessed against him. While the payment by Hader of these deficiency taxes, or the settlement by Hader with the Government of his tax liability would have released Hughson as surety on the bonds, the release of Hughson as surety on the bonds would not have operated to release Hader of his tax liability.

We very earnestly, honestly, and candidly insist that we have clearly established beyond the peradventure of a doubt, that we have succeeded in not only showing, but proving conclusively, that inasmuch as Hader had no right to appeal, he perfected no appeal, and therefore, there was no consideration for the execution of the four bonds in suit, which were signed by the appellant Hughson.

With equal earnestness, we believe that we have unquestionably, established the fact that neither the abatement claims filed by Hader, nor the bonds, were filed within the time required by law and the rules of the Treasury Department, and that therefore, their filing did not operate to stay the hand of the Treasury Department in seeking the collection of the taxes due it from Hader.

We also believe we have presented indisputable proof that there was a complete accord and satisfaction between Hughson and the Commissioner of Internal Revenue, and that the acceptance by the Com-

missioner of Hughson's check for $100.00, under the proven circumstances, completely released Hughson from all liability on these bonds, even if the Court were to conclude that there was consideration for the bonds, and that the bonds were filed in time.

Quite frankly, we claim that this is a case in which, under all of the circumstances, appellant Hughson is justified and strictly within his rights in raising the defense of the Statute of Limitations. The bonds, if binding at all, became binding upon the dismissal of Hader's abortive appeal on the 17th of November, 1925, and this action was commenced more than five years thereafter.

As to the claims advanced by appellant Hughson, covering errors of the trial Court in admitting certain evidence, we say that as this action was based upon four certain, definite, specific, written contracts, the lower Court was not justified in admitting any evidence of any transaction or action of the Treasury Department occurring prior to the date on which these bonds were signed.

Concerning the twelfth point advanced by us in this brief, we feel satisfied that this Court, having scrutinized Plaintiff's Exhibit No. 2 in the light of the criticism which we have directed against it, will unquestionably appreciate the fact that as this exhibit does not refer to the actual liability which Hughson was seeking to compromise, it was improperly admitted in evidence, and served merely to confuse the Court in arriving at a conclusion as to the plea of accord and satisfaction which was advanced by appellant Hughson in the answer filed in this proceeding.

We humbly pray that this Court make its order reversing the judgment of the United States District Court in favor of appellee, and direct that judgment be entered in favor of appellant Hughson, for costs.

Dated, San Francisco,
January 25, 1932

Respectfully submitted,

HARRY F. SULLIVAN,
Attorney for Appellant.